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No. 87-1331

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAN-AMERICAN LIFE INSURANCE COMPANY, ET AL.,
PETITIONERS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the court of appeals erred in issuing a writ of mandamus ordering the district court to dismiss the Secretary of Health and Human Services (HHS) as an involuntary plaintiff in petitioners' suit under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III) 1001 *et seq.*, where the purpose of making HHS an involuntary plaintiff was to force it to litigate in a United States district court a contract dispute over which the court had no jurisdiction.

1. The Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, establishes an exclusive mechanism for resolving most disputes arising out of government contracts. Under the CDA, contractor claims against the government and government claims against a contractor are initially considered by a contracting officer, who issues a written decision on each claim (41 U.S.C. 605). The

CDA provides that, following that decision, a dissatisfied contractor may either appeal to the agency's board of contract appeals (41 U.S.C. 606)—from which review is available in the Court of Appeals for the Federal Circuit under 41 U.S.C. 607(g)(1)—or bring an action directly on the claim in the United States Claims Court (41 U.S.C. 609).[1] The CDA does not permit the initiation or review of contract claims in the district courts. See *ibid.* To the contrary, 28 U.S.C. 1346(a)(2) explicitly denies the district courts jurisdiction of any claim "founded upon any express or implied contract with the United States * * *."

2. Between 1966 and 1980, HHS awarded a series of contracts to petitioner Pan-American Life Insurance Company (Pan-American) under which Pan-American was to process certain Medicare claims within the State of Louisiana. The contracts provided that Pan-American would be reimbursed for administrative costs, and between 1966 and 1984 Pan-American charged the Medicare program almost $3 million for pension costs for Pan-American employees working on the contracts. The last Medicare contract with Pan-American was terminated on December 31, 1984. Pursuant to the terms of that contract (see note 5, *infra*), an adjustment of previously allowable pension costs was to be made at the time of termination. A preliminary audit revealed that HHS had overpaid Pan-American in the amount of $2,759,828. Pet. App. 17a-19a, 30a-32a.

After the termination of the contract, former participants in the Pan-American Life Insurance Company Employees' Retirement Plan filed suit against Pan-

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[1] Originally, the CDA provided for appeals to the United States Court of Claims, which was abolished by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The trial functions of the Court of Claims have been transferred to the Claims Court.

American in the United States District Court for the Eastern District of Louisiana (Pet. App. 16a-31a). The complaint alleged that the employees had a stake in approximately $6 million in pension benefits they alleged should have been paid to employees for work done for Pan-American in connection with the Medicare contracts (Pet. App. 28a-29a). Plaintiffs sought "an allocation of the plan as delineated in [29 U.S.C. 1344]."[2] HHS was not named as a defendant in this action.

3. At plaintiffs' suggestion, and over HHS's objections, the district court joined HHS as an involuntary plaintiff pursuant to Fed. R. Civ. P. 19(a) (Pet. App. 1a). The apparent effect of this order would be to require HHS to litigate in this case in the district court its claim for repayment of any amounts it may have overpaid Pan-American for pension costs. On January 20, 1987, the Secretary moved for dismissal of HHS arguing, inter alia, that the district court lacked jurisdiction over any contract dispute between HHS and Pan-American because 28 U.S.C. 1346(a)(2) denies the district courts jurisdiction over such disputes. At the same time the Secretary sought leave for HHS to appear as amicus curiae to apprise the court of the government's interest in the disputed funds (Pet. App. 58a-62a).[3]

The district court denied the motion to dismiss and denied the motion to appear amicus curiae as moot (Pet. App. 2a). The Secretary then filed a motion to certify the denial of the motion to dismiss for interlocutory appeal

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[2] 29 U.S.C. 1344 provides that "[i]n the case of the termination of a single-employer defined benefit plan, the plan shall allocate assets of the plan" according to a statutorily defined formula.

[3] At that time, HHS had not asserted a formal claim against Pan-American for overpayment on the contract since only a preliminary audit had been completed. A formal claim has since been asserted in the amount of $2,678,135.

pursuant to 28 U.S.C. 1292(b). When the district court denied this motion (Pet. App. 3a-4a), the Secretary petitioned the court of appeals for a writ of mandamus directing the district court to dismiss the Secretary from the case. The court of appeals granted the petition, noting that a writ of mandamus was "the only available means to accomplish review of the district court's jurisdiction at this stage of the proceedings" (Pet. App. 5a).

4. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

a. The government asserts a contract claim against a contractor by means of a written decision issued by the contracting officer. 41 U.S.C. 605(a). This decision is "final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized" in the CDA. 41 U.S.C. 605(b). The CDA provides that the final decision of a contracting officer may be challenged either by appealing to the board of contract appeals (41 U.S.C. 606) or by filing an action in the Claims Court (41 U.S.C. 609). The districts courts have been expressly denied jurisdiction over such claims. 28 U.S.C. 1346(a)(2) ("the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 U.S.C. 607(g)(1) and 609(a)(1)]").

On October 27, 1987, after the writ of mandamus was issued to the district court in this case, the government contracting officer issued a final decision finding that Pan-American owed the government $2,678,135 in overpayments. A demand letter asserting this claim was sent to

Pan-American. Because the 90-day period in which to appeal to the agency board of contract appeals has now expired (41 U.S.C. 606), Pan-American, if it chooses to contest this claim, must file a direct action in the Claims Court. HHS cannot, directly or indirectly, be forced to litigate the claim in the district court. Nor could HHS have been forced to litigate the claim prematurely in the district court prior to issuance of the contracting officer's final decision.

b. Petitioners attempt to evade the jurisdictional limitations of the CDA in two ways. First, petitioners argue (Pet. 8-14) that, because the employees' suit against Pan-American arises under ERISA and because HHS may have an interest in some of the same funds in which the employees assert an interest, the government's contract claim also arises under ERISA and, hence, falls within the general federal question jurisdiction of the district court (28 U.S.C. 1331). This argument is patently wrong. HHS does not have an ERISA claim against Pan-American; it has a claim for overpayment under the Medicare contract, which may be heard only by an agency board of contract appeals or in the Claims Court.[4]

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[4] It is clear that a claim by HHS against Pan-American for overpayment does not fall within Section 502 of ERISA, 29 U.S.C. 1132 (providing for civil enforcement actions). "ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues of this case. A suit for similar relief by some other party does not 'arise under' that provision." *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27 (1983).

Petitioners' reliance (Pet. 8-11) on *Metropolitan Life Ins. Co.* v. *Taylor*, No. 85-686 (Apr. 6, 1987), and other cases from this Court discussing when ERISA preempts state-law claims and when ERISA-related suits should be heard in federal rather than state court is misplaced. No such questions are presented here. No ERISA issues are

Second, petitioners contend (Pet. 16-18) that the CDA does not apply to HHS's claim against Pan-American because the original contract between HHS and Pan-American was entered into before the effective date of the CDA. See 41 U.S.C. 601 note (CDA applies "to contracts entered into" on or after March 1, 1979). This argument fails for two reasons. First, the overpayment dispute does not concern a breach of any obligation under the 1966 contract. It concerns the obligation under the 1980 contract to settle any overpayment or underpayment in the pension fund at the time of the termination of the contract, an event that occurred in 1984.[5] Article XXIII of the 1980 contract expressly states that "[t]his agreement is subject to the Contract Disputes Act of 1978."

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implicated in the dispute between HHS and Pan-American. In *Northeast Dep't ILGWU Health & Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 156-159 (3d Cir. 1985), upon which petitioners also rely (Pet. 13), the court found federal question jurisdiction in a dispute between two rival ERISA plans that was not explicitly authorized by ERISA on the theory that the courts would have to apply a "federal common law" of ERISA to resolve the dispute. But the contract dispute between the Secretary and Pan-American does not involve the application of ERISA law at all. It is purely a government contract dispute to be resolved in the forums provided by Congress.

[5] Article XXIX of the 1980 contract (a copy of which has been lodged with the Clerk) provides in pertinent part that upon termination of the agreement "any funds advanced to the Carrier under this agreement which have not been expended or encumbered in accordance with the terms of this agreement prior to the date the agreement was terminated shall be returned to the Secretary and any funds determined to be due to the Secretary or the Carrier after application of Article XVII shall be paid to such party." Article XXVI of the 1980 contract provides that any functions undertaken pursuant to prior agreements and continued in the 1980 agreement "shall be deemed to be performed under and subject to the terms of this agreement."

Second, jurisdiction would not in any event lie in the district court over a dispute concerning payments made pursuant to contracts entered into prior to the effective date of the CDA. Prior to the enactment of the CDA, contract disputes where the amount in controversy was more than $10,000 were within the exclusive jurisdiction of the Court of Claims. 28 U.S.C. (1976 ed.) 1491 (see note 1, *supra*). The amount claimed by the Secretary here is substantially more than $10,000. Thus, even under pre-CDA law, the contract dispute over this amount would not have been within the jurisdiction of the district court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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